

# Challenges in the Constitution Making Process: Problems of Participation and Protecting Diversity in the Interplay Between Rule of Law and Democracy<sup>1</sup>

Araştırma<sup>2</sup>

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Constitutions represent the legal basics of a country. They contain the rules that are fundamental for governing the community. Today, most countries of the world have one central document in which all or most of these rules are laid down. In a few countries, such as Austria, Israel or the United Kingdom, several documents taken together form the constitution. Sometimes, constitutional documents, be they one or more, are combined with other sources of constitutional law such as custom or even religious rules. In any case, the idea that a country should have a constitution has been adopted throughout the world. Whatever differences or similarities between constitutions there may be it is obvious that some common ideas govern at least constitutional law. There is hardly a country in the world that does not explicitly state to be a democracy and that it should respect the rule of law and fundamental rights. At least in theory, these ideas have been accepted throughout the world.

Constitutions differ. They are long or short, stable or easily changed. Government institutions as established by the constitutions vary in structure and powers. Mostly, however, constitutions give an idea of the very identity of a country. Usually, no other law of a given legal system may contradict the constitution of that specific country. All other laws and legal rules must then comply with what the constitution says.

Constitutions are meant to rule reality. As all law intends to do constitutions should direct the facts of life, the actions of governments. They not always do. In some countries, constitutions are strong and they are implemented in fact. In other countries, the respect for the constitution is weak. In such cases there may well be a convincing constitution, nicely worded, and in perfect harmony with what can be regarded as being good and just. Nevertheless, the factual situation in that country may well be intolerable. Constitutions can be misused as mere propaganda, but constitutions then can serve as yardsticks to insist on improvement.

Constitutions develop. Most constitutions contain explicit provisions providing for the amendment of the constitution. Usually, these provisions differ from the normal process of legislation and make the change of the constitutions more difficult. On the other hand, no wording of a constitution can escape interpretation. Even if the words remain the same, the understanding of what these words mean, develops during time. The text of a constitution can be interpreted narrowly or generously, and what equality means or freedom differs from generation

1 08.10.2012 günü Hacettepe Üniversitesi Hukuk Fakültesi açılış töreninde yapılan konuşma.

2 Bu makale hakem incelemesinden geçirilmemiştir.

to generation, from country to country, and from culture to culture.

Constitutions relate to religion. Religion is a central topic of constitutions throughout the world. Some sort of separation between churches or other religious communities and the state is predominant. Separation may be radical in words or moderate. It can be hostile in order to push away religion or it can be friendly to let religion have the freedom to flourish. As usual, much depends on practice. There are a number of constitutions declaring a certain religion or confession to be the religion of the state, the predominant religion or a church to be the people's church. Others define themselves explicitly as Islamic republics or refer to Christianity. These explicit identities as secular or religious do not necessarily lead to unequal treatment of other religions or even to a loss of religious freedom.

Peter Häberle, the famous German constitutionalist, has said that a constitution "is not only a legal text or a normative system of rules, but also an expression of a state of cultural development, a means of the cultural self-portrayal of a people, mirror of its cultural heritage and fundament of its hopes". One may add that this is the case when a constitution succeeds, when it is in fact an expression of the identity of a people, not just a mere octroy, an alien part of law imposed on the people. A constitution needs to be accepted in order to be alive, a people must live its constitution to make it happen. That means also that the constitutional provisions should represent the will of the people - that people can identify with them. Acceptance of a constitution is best achieved when all parts of society can identify with it. That means the divers parts of society must be able to find in the very constitution themselves, their hopes, their identity, their needs. If only one part - and be it the majority - can identify with the constitution, the germ of destruction is laid in the center of society. Constitution is meant to enable peace, not destruction. The very idea of constitution, therefore, requires acceptance of diversity, requires respect for difference, requires the ability for compromise.

If we turn to religion - today again one of the most explosive fields of life - I will ask:

How best should the relationship between

State and religions be structured? This must be discussed in a globalized world, in view of international human rights instruments and in view of agreed basic structures of statehood such as democracy and the rule of law. And all that I will say now is meant ask questions, not to give final answers. I mean this to engage in a process of discussion. I mean this to hear, to listen, and to learn myself.

Constitutions must give religion a place. All attempts in history to do away with religion have failed. Whenever people have succeeded to make use of the positive contribution of religion, to make use of its power of community building, societies have flourished. This is also a question of democracy: People must be able to find their religious convictions and their religious needs represented in the legal order, all people in all their diversity. It is the same question as to economic needs, cultural needs or political needs. This is also a question of rule of law: The law must accommodate all people with all their needs, all people in all their diversity. People must be able to participate in the rule of law.

One way of doing this is turning to the notion of a secular state. In doing so, it is necessary to understand the idea "secular" in a positive sense. Let me do so in turning to my own country, Germany. Secularity has become a central point in the political discussion in Germany, although the German constitution does not say that the state is secular. Secularity is not a constitutional term in Germany. The Federal Constitutional Court takes from the constitution that the German state has to be 'neutral' in view of religion and world views. However, the terms merge and they can be seen similar in substance.

Secularity - and neutrality - requires the state not to identify with a religion or a religious organization. The state is not allowed to have any special inclination to a particular religious community or to judge such an organization's particular merits or ideologies to be true. On the other hand, religious institutions must not be placed in a more disadvantageous position than societal groups; anti-religious state policies would be incompatible with a neutral approach, because these would discriminate against religion. This prohibits a decision in favour of state atheism.

Neutrality, furthermore, means non-intervention, that is, the state is not allowed to take decisive action in the affairs of religious communities. This is made particularly clear by the constitution: 'Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all.'

Neutrality does not mean neutrality in respect of specific values. It is quite clear that the Basic Law and with it the entire legal system is based on strong values such as human dignity, freedom, and equality. However, neutrality means not to identify with a specific religious or philosophical concept, teaching or institution. State neutrality is not violated when the state takes up values and concepts that have been developed in the religious sphere.

Neutrality also means positive neutrality. This concept obligates the state to actively support religion and to provide for the space religion needs to flourish. This makes possible and requires, for example, for the state to include religious needs in planning law: State authorities have to provide for real estates in their urban development plans on which religious communities can construct places of worship according to the needs of the population. This concept of positive neutrality is predominant in the official discourses and not only in the law. It is actively supported and implemented by the courts and state authorities.

This requires Germany also to accommodate Muslim needs. It requires Germany to accommodate the needs of the many people who have their origins in Turkey. We in Germany have still a long way to go in this direction. Secularity understood as positive neutrality integrates all people of a society with all their legitimate interests, their rights and freedoms. Constitutions must enable change and development.

The secular state is thus a state of freedom of religion, a state that respects the religious life of its citizens, a state that supports religion as an expression of freedom based in human rights. The secular state guarantees the autonomy of religious communities, it provides the necessary conditions for religion to flourish, and welcomes their contributions to the public democratic process.

All this is found also in the European Convention of Human Rights in its Article 9 which

guarantees the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Limitations must be "necessary in a democratic society". The European Court of Human Rights has found that democratic society necessarily presupposes religious pluralism. In articulating the importance of freedom of religion or belief, the European Court has noted that it is "one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it". Similarly, the Court has acknowledged the significance of the "pluralism, tolerance and broadmindedness without which there is no democratic society

The Court has recognized the importance of a margin of appreciation of cultural difference that State authorities have in this area. This is vital to the gradual process of European integration while maintaining respect for difference in relation to religious and cultural matters. Nonetheless, the Court has made it clear that in delimiting the margin of appreciation that applies to religious freedom issues, it "must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society".

Limitations can also be made when necessary to "protect the fundamental rights and freedoms of others." People can deny respect for other people, a society may face intolerance, diversity may even be taken by some as a pretext for violence. Indeed, the European Court of Human Rights has made clear that under Article 9 of the European Convention, even though religious differences may result in discord, what is at stake in such cases "is the preservation of pluralism and the proper functioning of democracy . . . . Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other."